

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.1136 OF 2007.

Babasaheb Bharmu Barwade. ... Petitioner.
Versus.
Vanikant Babasaheb Barwade & others. ... Respondents.

Shri Ashutosh Gole for the Petitioner.

Ms. Prajakta M.Arjunwadkar for the Respondents Nos.2 & 3.

CORAM : ABHAY S.OKA, J.

DATED : 14th June, 2007.

P.C.:

1. Notice of final disposal was ordered to be issued by order dated 22nd February 2007. The office noting shows that the 1st, 4th and 5th Respondents have been duly served with the notice. The 2nd and 3rd Respondents are represented by an Advocate. The Petitioner is the original Plaintiff who has taken exception to the order dated 23rd November 2006 passed by the Civil Judge, Junior Division, Kurundwad below Application at Exh.49. The Application at Exh.49 was made by the Petitioner/Plaintiff for amendment of the plaint. By the impugned order the said application has been rejected.

2. The suit was filed for declaration that the alleged 5/16th share of the Petitioner/Plaintiff was not liable for attachment and sale in execution of the award/decreed in favour of the 2nd Respondent. The Application for amendment has been rejected mainly on the ground of bar created by sub-rule (3) of Rule 2 of

Order II of the Code of Civil Procedure, 1908.

3. I have considered the submissions of the learned Advocates appearing for the parties. The submission of the Advocate for the Petitioner is that the proposed amendment does not change the nature of the suit and the same was necessary for effectively adjudicating the merits of the case. The learned Counsel appearing for the 2nd and 3rd Respondents submitted that by the proposed amendment, the Petitioner wants to substitute the original cause of action by an altogether new cause of action. It is submitted that though the ground on which the Application for amendment is rejected may not be correct, but on the grounds pleaded by him the Application deserves to be rejected.

4. On a plain reading of the impugned order, the ground on which the Application has been rejected cannot be sustained. As a normal rule, the amendment of the plaint ought to have been allowed. A perusal of the text of the amendment shows that the same will not change the nature of the suit. If the averments made in the original plaint are read, it is obvious that the cause of action is not sought to be substituted by the proposed amendment. In my view the learned Judge has taken a hypertechnical view of the matter. This was a case where the amendment ought to have been allowed subject to payment of costs to the contesting parties.

The amount of costs is quantified at Rs.3000/- payable to the 2nd Respondent.

5. Hence the following order is passed:

(i) The impugned order dated 3rd November 2006 is quashed and set aside. The Application at Exh.49 made by the Petitioner is allowed subject to the Petitioner paying costs of Rs.3000/- to the 2nd Respondent within a period of six weeks from today. Deposit of the amount with the trial Court within the stipulated period will be treated as sufficient compliance with this order.

(ii) After amendment is carried out, the Respondents will be entitled to file additional written statement within a period of six weeks from date on which the Respondents/Defendants are served with the amended copy of the plaint.

(Viii) All contentions of the parties on merits of the matter are expressly kept open.

(vi) Writ petition is disposed of in the above terms.

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Judge .